

Criminal Liability for Illegal Actions Concerning Insider Information in the Republic of Kazakhstan

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ABSTRACT

The article considers the analysis of a crime under rule 230 of the Criminal code of the Republic of Kazakhstan (illegal actions in relation to insider information). The authors discuss the concept of insider information, the interpretation to the possibility of its misuse. A brief analysis of the object and the subject of insider information is provided, which serve securities, financial instruments, derivative financial instruments, and the approaches to their interpretation. A separate scientific classification of securities is given. The absence of a legislated list is emphasized. The content of the objective side is reviewed that lies in the restrictions on disposal and in the use of insider information. It is noted that insider information does not include information prepared on the basis of publicly available information or derived from media. The subject and the subjective side of the considered corpus delict are allocated. The article discusses the European Union's approach to the legal regulation of market abuses, the establishment of strict administrative and criminal liability for insider dealing and market manipulation. The laws of some foreign countries on the subject are studied and suggestions for the improvement of certain provisions of the law are made.

KEYWORDS

Criminal offences; economic relations;
stock market; insider information;
financial instruments.

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Introduction

The outbreak of the global financial crisis, reaching beyond the financial system, turned into an economic crisis, which proved to be extremely sensitive to the economies of most Asian countries, including Kazakhstan.

In order to implement crisis management and structural reforms the country is carrying out new investment and social policy. It is aimed at stabilizing the financial sector, optimization of fiscal policy, stimulation of economic competition. Currently already implemented certain stabilization

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measures. In particular, there are incentives, such as the abolition of the visa regime for citizens of 20 countries; established a center for support of investors implementing priority investment projects; the regime carried out a tax breaks. As a consequence, in the global ranking of countries, creating the most favorable conditions for business, Kazakhstan ranked 41st position (Kazakhstan pravda, 2015).

Meanwhile, further reforms, aimed at improving the investment climate in Kazakhstan, possible only in close cooperation with the Organization for economic cooperation and development (hereinafter OECD) and other international financial institutions. Besides, it is necessary to bring national legislation into line with international standards. An essential condition for sustained economic development of Kazakhstan is also increasing the competitiveness, transparency and security of the domestic financial market.

In addition, the creation of an international financial centre "Astana" (Annon., 2015) requires guarantees reliable protection of interests of investors on the securities market. Unfortunately, this direction of economic security has not yet found due attention of the domestic researchers. The lack of appropriate developments of Kazakhstan and the imperfection of national legislation creates preconditions for unlawful use of insider information, which can lead to negative consequences, including the destabilization of the world financial market.

According to some researchers, the misuse of insider information poses a threat to the economic security of States. In particular, insider trading can undermine investor confidence and the trading to organised financial and commodity markets, cause information asymmetries in the market (Karpovich, 2011), impair fair competition, raise the cost of investment (Bhattacharya & Daouk, 2002; Komekbayeva et al., 2016).

Many countries have developed a legal system to protect insider information from unauthorized disclosure or use. This system, usually created for the normal functioning of the investors who may lose their advantages in the financial market, in the case of public disclosure of insider information (Karpovich, 2011).

Unfortunately, the type of information insufficiently studied in Russian legal science, including issues of criminal responsibility for illegal actions associated with the use of insider information.

It should also be noted that on January 1, 2015 entered into force the Treaty on the Eurasian economic Union. Russia and Kazakhstan have become participants of the Union (Annon., 2014b).

Market relations in the framework of the Eurasian economic Union cannot develop effectively without a common securities market. This implies the need for compatibility of legal regulation in the countries participating in the Union. A lot of work in terms of harmonization of legislation, including the accountability for offenses committed in the sphere of issuance and circulation of securities and the exercise of the rights on them.

In this regard, these problems became the subject of this article.

Literature review

For a proper understanding of the studied categories, it is necessary first to proceed from Directive 2003/6/EU. Paragraph 1 of rule 1 of the Directive defines insider information as having a known value and are not disclosed publicly. It can refer to one or more issuers of financial instruments or to one or more such tools. In the case of disclosure of this insider, information can have a significant impact on prices of financial instruments or related derivatives (European Parliament, 2003).

In Kazakhstan the term "insider information" was legislated in the Law of the Republic of Kazakhstan of July 2, 2003 "On securities market" (Annon., 2003) and the Law of the Republic of Kazakhstan of February 19, 2007 "On amendments and additions to some legislative acts of the Republic of Kazakhstan on protection of rights of minority investors" (Annon., 2007).

The resolution of Board of National Bank of the Republic of Kazakhstan № 69 "On approval of Rules of disclosure of insider information on the securities market" was approved on February 24, 2012 (Annon., 2012). It was fitted with the procedure and terms of disclosure of insider information relating to the activities of the Issuer. In addition, we determined the content of information that may influence the value of the issued (provided) by the Issuer of securities and derivative financial instruments.

The definition of insider information was further duplicated in the note to rule 205-3 of the Criminal code of the Republic of Kazakhstan (hereinafter CC RK) (in edition of Law of RK of 10.06.14 g. № 206-V). According to this note, under insider information means accurate information on securities and derivative financial instruments and any transactions with them. Insider information also includes information about the issuing or providing securities or derivative financial instruments. It could be data on activities, constituting a commercial secret. In addition, other information not known to third parties, the disclosure of which could influence the change in the value of securities or derivatives or to their activity of the Issuer (Annon., 2014a).

As it can be seen from the definition of sectoral legislation, the scope of application extends the content of insider information, but keeps the subject of regulation.

We would like to specify that in the post-Soviet space in recent years, scientists of the countries of the Eurasian economic Union (hereinafter EAEC), have repeatedly appealed to the consideration of concepts and issues related to combating illegal use of insider information (Minbaleev, 2011; Bosumbaeva, 2015), some authors studied in detail the experience of foreign countries, associated with liability for insider (Vozhakin & Minbaleev, 2015; Vozhakin, 2015; Timofeev, 2011).

Today, the most contentious and controversial in the legal literature is the interpretation of the concept of "use" of inside information.

Therefore, a group of Russian scientists under the use of insider information for transactions with financial instruments, foreign currencies or

commodities, considers any activity associated with illegally obtained insider information. Including cases involving the adoption of it into account or influence the decision to perform the transaction or to abandon it, or otherwise impact on the essential terms of the Commission of such a transaction (Klepitskiy, 2011).

It is also suggested that the use of insider information may be made by giving recommendations to third parties. It may involve a reasoned advice to another participant on the securities market regarding the transaction. In this case, the fact that posts insider information is not required. Importantly, personal awareness of the perpetrator regarding this information have been taken into account when giving such recommendations. The qualification of the offense, not affected by the motives of such actions. Retribution is also not a prerequisite for criminal responsibility (Klepitskiy, 2011).

Some authors believe that the use of the word "use" was not quite successful in identifying the whole range of banned activities, including its disclosure. "Use" in the Russian language means-targeted benefits and points to the guilt of only direct intent. In cases when a person does not remove any benefits, but, for example, disclosed inside information in a private conversation, or forgotten sensitive documents home with them relatives or friends, it cannot be considered a use. The relatives and friends is not liable (Klepitskiy, 2011).

A number of authors use the term "persons possessing insider information". In particular, T. Tridmas referred to persons possessing inside information from so-called "second hands", people who are not employees of the company, for example, a cab driver who heard in the car the conversation of top managers about an upcoming transaction (Tridmas, 1991).

Some authors, on the basis of the analysis of foreign legislation use the definition of "insider trading" refers to buying or selling of securities by a person holding relevant information in respect of these securities, and bearing a fiduciary duty to the owners of the securities or the transfer of such information to other persons (Minbaleev, 2011; Bosumbaeva, 2015; Vozhakin & Minbaleev, 2015).

Foreign scientists for quite a long time, studies (Annon., 2014b; Tridmas, 1991) and a wide-ranging debate on the issues of insider trading.

Aim of the Study

To consider the crime in relation to insider information

Research questions

How the offences are regulated in relation to insider information in the EU?

Method

In the study, according to specially designed questionnaires, a survey of law enforcement officers and professors of the Karaganda region was conducted.

In this work, the authors carried out analysis and generalization of domestic financial, civil, civil procedural law, criminal procedural law, tax,

banking legislation, as well as studied a number of international legal acts and international experience of individual countries.

In particular, we conducted the monitoring of the most important laws and regulations including: Laws of the Republic of Kazakhstan "On securities market" of July 2, 2003 "About joint-stock companies" of May 13, 2003 No. 415, "On amendments and additions to some legislative acts of the Republic of Kazakhstan concerning counteraction to legalization (laundering) of incomes obtained in a criminal way, and terrorism financing" of June 10, 2014 No. 206-5; resolution of Board of National Bank of the Republic of Kazakhstan of February 24, 2012 № 69 "On approval of Rules of disclosure of insider information on the securities market".

The experience of individual countries regulation of insider activities is analysed, including the experience of the European Union (hereinafter EU). The study reviewed and summarized foreign models of control over insider trading and manipulation. The European model is analyzed, which received its consolidation in the EU directives. In this regard, the following regulations and EU Directives are tested: Directive 2003/6/EU of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse); Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive); Regulation (EU) № 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) № 648/2012).

The experience of the Russian Federation is studied based on the European model, the regulation of insider activities. However, Russian regulation of insider is peculiar to certain specific traits: a wide scope, including financial instruments, foreign currency and commodities.

Data, Analysis, and Results

The assignment of a document to securities is a necessary condition for defining subject of criminal assault. In particular, to determine the subject of a criminal offense under rule 230 of the criminal code.

It should be borne in mind that the concept of "securities", "financial instruments, "derivative financial instruments" have a different interpretation.

According to part 1 of rule 129 of the Civil code of the Republic of Kazakhstan (Annon., 1994a) and the Law of RK of July 2, 2003 "On securities market" (Annon., 2003) under a security is a set of certain records and other indications certifying property rights.

The securities of the civil code include stocks, bonds and other securities, which are defined by either the code or other legislative acts of the Republic of Kazakhstan. Thus, civil code of Kazakhstan does not give an exhaustive list of the securities types and allows broad interpretation.

In contrast to the SC RK part 2 of rule 142 of the civil code along with share and bond as securities transfers the promissory note, the mortgage, an investment unit of mutual Fund, bill of lading, check. It is provided that there

may be other securities named as such in special laws or established in the manner prescribed by law (Annon., 1994b).

Despite the fact that the civil code does not define the list of types of securities in the legal literature there are many approaches to the classification of the institution.

M. M. Agarkov, based on the traditions of German civil law, offered their own classification of securities. He shared them in public with confidence (bearer, registered, to order); non-public reliability (ordinary registered) (Agarkov, 1994).

V. A. Belov all securities, depending on business objectives, divided into three groups: investment, trade and title. The first proposes to include securities related to the treatment of cash and other property for conducting commercial activities. The trading securities are those, which are made out for the loan under a single specific operation. With the help of title acquisition of goods in temporary possession of the target, and executed any transactions in interests of the creditor (Belov, 2007).

R. H. Aitdinov, based on the wording of the civil code, considers the division of securities in certificated and uncertificated as the basis for legal regulation of their issue and circulation, providing a variety of legal regime for each group (Minbaleev, 2011).

There is also the division into equity and non-equity (Bosumbaeva, 2015; Vozhakin & Minbaleev, 2015).

According to section 96 of rule 1 of the Law of the Republic of Kazakhstan "On securities market", equity securities are securities, which have homogeneous characteristics and details in the same issue, posted and traded on the same conditions. The equity securities include shares, bonds, and government securities (Annon., 2003).

Securities that are not inherent in the combination of homogeneous characteristics are recognized as promissory notes. They are issued in a "piece" and their owner is secured for individual rights. The non-equity securities include warehouse receipt, bill of exchange, and bank certificate.

Meanwhile, we specify the following, despite the wide scientific classification of securities, unfortunately, absent a statutory list. This in turn causes difficulty in law enforcement, especially when there is a question on bringing to criminal liability for illegal actions with securities. Thus, in particular, in many legislative acts do not specify that the document is a valuable and competent person have intuitively determined whether the document meets the criteria specified in rule 129 of the criminal code.

For example, clause 31 of the Law of the Republic of Kazakhstan of January 17, 2002 "About merchant shipping" provides that the bill of lading is a document issued by the carrier to the sender and certifying the reception of goods to be transported (Annon., 2002). According to the Law of the Republic of Kazakhstan of April 28, 1997 "On promissory notes circulation in Kazakhstan":

the promissory note is a payment document, which has a strictly prescribed form and contains a unilateral unconditional obligation (Annon., 1997).

In this regard, it would be appropriate to stipulate the list of payment documents relating to securities in the civil code, and in case of the emergence of new – add to the list. This approach would facilitate more effective financial-credit activities in Kazakhstan on the securities market and protection from illegal actions of the representatives of services in the financial sector.

Besides, along with traditional types of securities, some dematerialized and derivative financial instruments appear on the Kazakhstan financial market, which also require its classification and legal regulation (Minbaleev, 2011).

It should be noted that in the legal environment, the legal list of securities was already proposed to expand. Its derivatives and securities include options, depository receipts, future contracts, contracts for difference, warrants and other (Chuprova, 2007).

In contrast to Kazakhstan, the Federal law of Russia imposed a ban on the use of insider information that covers not only the securities market, but also currency and commodity markets.

In this regard, we agree with the opinion of I. A. Klepitsky, who pointed out that the threat of insider information with respect to the currency is not excluded, but with respect to trading goods, this possibility can be doubted (Klepitskiy, 2011).

According to rule 128-1 of the civil code of RK, financial instrument is money and securities including derivative securities. These include derivative financial instruments and other financial instruments if, as a result of the transaction, at the same time the financial asset at one company and a financial liability or equity instrument at another arise.

According to rule 128-2 civil code of Kazakhstan, derivative financial instrument is an agreement, which value depends on the value of the underlying asset of the contract (including taking into account fluctuations in value), providing for the implementation of the calculation under this agreement in the future.

The law for derivative financial instruments include options, futures, forwards, swaps and other derivative financial instruments that meet the above criteria. They also include the agreement, which is a combination of the above derivative financial instruments.

Thus, from the presented analysis shows that in Kazakhstan is regulated by the main provisions of the securities market. However, there are enough arguments for further improvement of the legislation in this field.

A unified solution to the above questions is of particular significance in bringing individuals responsible for illegal actions related to insider information.

This view was supported by 70 % of law enforcement officers and teachers of the law faculty of the E. A. Buketov Karaganda State University, interviewed in 2012, according to specially designed questionnaires. It should be noted that only 8% of respondents gave a negative, but 22% were undecided.

Criminal liability for illegal use of insider information was introduced in the criminal code rule 205-3 (1997) in Chapter 7, "Crimes in the sphere of economic activity" in 2014 alone (Annon., 2014a).

Disposition of part 1 of rule 205-3 of the criminal code provides liability only for intentional use of insider information. This had to be carried out transactions with securities or derivative financial instruments. On the other hand, the fact of illegal transfer of insider information to third parties, or provides recommendations or suggestions on transactions with securities and derivative financial instruments based on insider information. A mandatory condition for criminal responsibility was the consequences of causing of a large damage to the citizen, organization or state, or the generation of large income.

Part 2 of the rule 205-3 of the criminal code increased the liability for the same acts committed by group of persons by prior conspiracy or by an organized group or involving the generation of income in especially large amount, or committed by a person using his official position.

As it is known, the criminal law on the securities market, are blanket in nature. Thus, in accordance with rule 56-1 of the Law of July 2, 2003 "On securities market" (Annon., 2003) restrictions on disposal and use of insider information. In particular, it is prohibited to use insider information in transactions with securities or derivative financial instruments; transfer insider information to third parties or making available to third parties; to provide third parties with recommendations based on insider information for transactions with securities. In fact, given the constraints and make the objective side of illegal actions, committed with insider information.

In the criminal code as amended by 2014, the criminal liability for illegal actions in respect of insider information envisaged in rule 230 of the criminal code. Analysis of its content shows that there is a continuity and a new edition is virtually identical to the previously existing.

In the Republic of Kazakhstan, the law "About securities market" determined that the list of information related to insider, the procedure and terms of disclosure and internal control rules, to help distinguish between rights of access and prevention of unauthorized use shall be established by internal documents of the Issuer (Annon., 2003).

I. A. Klepitsky, referring to the list approved by the FFMS of Russia of August 14, 2011, believes that to produce an exhaustive list of insider information is impossible. In his opinion, it did not include even the most typical kinds of insider information – information about the negotiations, damages, claims and decisions of the courts, which result in losses as well as other information. In his opinion, is a mistake of legislative technique – casuistry-leading whitespace of the law (Klepitskiy, 2011). In general, we share this position, but an indicative list, it is still appropriate to establish or set clear criteria for the assignment of certain information to the insider.

When the solution of a question on bringing to criminal liability should be aware that insider information does not include information prepared on the basis of publicly available information or derived from media. In particular, such

information may include information obtained in the course of the study, related to the prediction and assessment as to the value of securities, or held for the purposes of making investment decisions and preparing recommendations or proposals to conduct transactions with securities.

The first part of article qualifies the act as criminal offense.

The act constitutes as a crime if it is committed by a group of persons in a preliminary conspiracy or caused large damage. In addition, if it is committed by a person using his official position (part 2 of rule 230 of the criminal code).

In accordance with paragraph 3 of rule 1 of the criminal code, an especially large damage in rule 230 of the criminal code is the damage for the sum of twenty thousand times the monthly calculation index.

Qualifying signs of this crime are recognized, the above acts committed by a criminal group. A list of definitions relating to criminal group as formulated in paragraph 24 of rule 3 of the criminal code.

The subject under consideration, criminal offense is a special subject – an insider. Under clause 35 rule 1 of the Law of the Republic of Kazakhstan of July 2, 2003 № 461 "On securities market" insider – person who has access to insider information. The Law also lists the persons who are insiders (Annon., 2003).

However, not all lawyers welcomed the statutory list of persons who are insiders. Thus, in particular I. A. Klepitsky believes that any list, especially a list of insiders is not appropriate. In this case, it refers to the legislation of the countries with developed market economies. Where an insider is any person possessing insider information, which significantly can affect the price of securities (Klepitskiy, 2011).

Meanwhile, with the given statement difficult to accept. Analysis of foreign regulatory sources shows that not all insiders are any person. Therefore, in particular, the law of England a person is recognized as possessing insider information, only if: it has access to information with the use of official position, profession or office; or receives information as a director, employee or shareholder of an Issuer of securities (rule 57 of the Act on criminal law 1993). Such actions can be considered criminal when a person possesses information of its own company or the companies, in which he/she works. This is called disclosure of primary insider information (Minbaleev, 2011).

However, it should be clarified that in Europe more common and latent crimes are so-called secondary insider activities. The essence of the offense is that the offender receives information that may affect the share price of insiders and subsequently uses it to commit transactions on the securities market. In this regard, the EU directives have used the concept of "using the official duties" of individuals who receive information from employees of the companies conducting transactions with securities, which significantly expands the range of persons who can be recognized by insiders (Tridmas, 1991).

Thus, given the experience of some foreign governments, it would be advisable to expand the list of persons subject to criminal liability for illegal use of insider information. Moreover, along with the person who has access to it, and

to recognize those who, after receiving insider information, manipulate her in order to obtain illegal profits, which brought considerable damage. Of course, such individuals should not bear the same responsibility as divulged insider information, but leave them unpunished is impossible, because ignoring this fact can lead to negative consequences.

The composition of the crime is material.

From the subjective point of view, the criminal offense is performed with direct intent. This means that the person should realize that he/she intentionally uses inside information when making transactions with securities or derivative financial instruments. The person who illegally passes insider information to third parties or intentionally illegally provides third parties with access to insider information shall also be liable. To bring to criminal liability, it should be proven that the owner of the insider information foresaw harmful consequences in the form of a large damage.

However, the Kazakhstani legislator does not stipulate that the above acts were committed for mercenary or other personal interest, as established in several foreign countries, such as Kyrgyzstan (Bosumbaeva, 2015).

Insider activity undermines market principles of fair competition. A disadvantage of market participants in the amount of known information leads to losses from the owners of the securities, it destroys the reputation of companies and large scale of national stock markets. In general, it can lead to destabilization of economic relations at both the micro and macro levels (Minbaleev, 2011).

Since it is quite difficult to prove direct intent in the actions of the perpetrator, we should resort to the help of experts and the public in order to expose the persons committing illegal acts. In order to improve the fight against illegal insider activity, it would be advisable to use the experience used in Germany and the United States. There is the possibility of remuneration payment to the persons who help in solving crimes with the use of insider information. The person receives remuneration, which may be paid from the fine imposed on the convicted (Bhattacharya & Daouk, 2002).

Discussion and Conclusion

This article attempts to analyze the object, objective side, subject and subjective side of the criminal offense under the rule 230 of the criminal code. The content of the subject of insider information is reviewed. We have also studied the laws of some foreign countries on the subject and made suggestions for improvement of certain provisions of the law.

From the above analysis, it is evident that Kazakhstan has been formed and regulated by the main provisions relative to the criminal liability for illegal use of insider information.

The Law of Kazakhstan "On securities market" defines the concept and content of the insider information; it was duplicated in other normative legal acts (Annon., 2003).

Liability for illegal actions in respect of insider information is envisaged in rule 230 of the criminal code. Analysis of its content shows that there is a continuity and a new edition is virtually identical to the previously existing.

Under the current legislation, persons recognized as insiders are subject to criminal liability, acting with direct intent using insider information when making transactions with securities or derivative financial instruments (Minbaleev, 2011). Liable are the persons, who intentionally, illegally passed inside information to third parties, either willfully, unlawfully provided third parties access to insider information, whether they had their personal interest or selfish purpose, or not.

We believe that it is necessary to use a uniform approach to the interpretation of the concepts of securities and financial instruments for the effective practice of application of norms of not only civil orientation, but also criminal legal sectors.

Implications and Recommendations

Thus, we can say that the meaning of the law, the liability occurs only for intentional acts related to the use of insider information in transactions with securities and (or) derivative financial instruments on the territory of Kazakhstan, which caused the occurrence of harmful consequences in the form of large or especially large damage.

In order to improve the current legislation that is rationally set in the civil code list of payment documents relating to securities and in the case of the emergence of new, to add to the list. This approach would facilitate more effective financial-credit activities in Kazakhstan on the securities market and protection from illegal actions of the representatives of services in the financial sector.

It is advisable to establish an indicative list of insider information or to define clear criteria for the inclusion of certain information to the insider.

It is reasonable to expand the list of persons subject to criminal liability for illegal use of insider information. Along with the person who has access to it, we should recognize those who, after receiving insider information, used it in order to obtain illegal profits, which brought considerable damage.

In order to improve the detection of illegal use of insider information, it is necessary to provide the payment of compensation to persons, who aid in the detection and disclosure of such offences. This fee may be paid from the fine imposed on the convicted, or at the expense of the Republican budget.

A unified solution to the above questions is of particular significance in bringing individuals responsible for illegal actions related to insider information.

Disclosure statement

No potential conflict of interest was reported by the authors.

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